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Funding New Zealand's Election Campaigns
recent stress points and potential responses

Abstract

The nexus between money and politics creates particular problems for liberal democracies like New Zealand. Events during the last parliamentary term put our present system of regulating this issue under some stress. With two cases relating to political fundraising now before the courts and other matters still under investigation by the Serious Fraud Office, this is the right time to consider whether reform of the law is needed and what such reform ought to look like.

Keywords political funding, electoral finance, corruption, electoral law

As soon as human societies began to accord exchange value to cattle, cowrie shells and shiny pieces of metal, money and politics became linked. Each represents a form of power. The possession of money, and the desire of others to obtain that money, bestows both economic sovereignty and dominance upon its holder. At the core of politics lies the struggle for and deployment of social influence and authority. The repeated use of one form of power to obtain and buttress the other can then be seen across time and place. Spending to gain elected office in the Roman Republic became so rampant that it contributed to the end of that system of rule; a fate that some suggest conceivably may befall the United States (Watts, 2018). Meanwhile, examples of political leaders using their governing authority to enrich themselves and their families unfortunately are legion.

The link between these two kinds of power becomes particularly problematic in places governed according to liberal-democratic principles, where freely elected representatives are expected to act in the interests of those they govern. Money's ubiquity means it is required for virtually any sort of election-related activity. Although there may be the odd candidate able to win a local council seat without spending anything on advertising, they still need to pay for petrol to travel to meetings, phone plans to talk to voters and supporters, any deposit required for their candidacy, and the like. Scale up to nationwide elections – where, in New Zealand's case,

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you need to communicate a political party's message to some three million potential voters in a way that will convince them of its merits – and an adequate supply of money becomes critical. It is noteworthy, for example, that three of the most recent 'big splash' attempts to enter our national political scene – Kim Dotcom's Internet Party, Colin Craig's Conservative Party and Gareth Morgan's The Opportunities Party – all shared something in common. All three organisations largely emerged fully formed from the deep pockets of their leader/benefactor.

Of course, these examples also prove that while having some money may be a necessary ingredient for political success, having a lot of it is far from a sufficient one. Even spending millions of dollars cannot compensate for a fundamentally flawed electoral product. Equally, a strong political kaupapa may overcome a relative lack of funds, as the Māori Party's comparative success on the smell of an oily rag showed at the 2008 election (and, to a lesser extent, again in 2020). So, a simple cause-and-effect claim along the lines of 'more money buys more political success' is clearly false.

Which is not to say that an opposite claim – 'money is irrelevant to political success' – is true. Any candidate or party who tries to argue that this is the case should be asked a very simple question: why do you accept donations from supporters, and are you perpetrating a fraud on them when you do so? Because it is a pretty safe bet that, all other things being equal, a candidate or party given the choice of facing either an opponent possessing twice their funds, or one with less funds than them, will plump for the latter option. After all, if money *might* make a difference in the electoral contest you are involved in, then you would be pretty silly to go into it at a significant disadvantage. That perception then creates problems in and of itself. It generates something of an arms race situation for candidates and parties, where having 'enough' money depends upon how much your competitors have available to spend (among other factors). And the logic of seeking to avoid comparative disadvantage while also obtaining a possible comparative advantage can drive behaviours that are harmful to the operation of representative democracy.

While the aim of creating a measure of political equality can justify some limits on election spending, tightening those limits too much can become unjustifiable.

Trying to manage the arms race

New Zealand traditionally endeavours to limit the threat of this political spending arms race effect by placing caps on how much parties, candidates, and third party 'promoters' acting independently of these primary contestants can incur in 'election expenses'. Individual candidates have been subject to such limits since the late 19th century, political parties since 1996 and third party promoters since 2008. At the 2020 election, individual electorate candidates were permitted to incur up to $28,200 in election expenses for their campaign to win a seat. Political parties could incur election expenses of $1,199,000 plus $28,200 for each seat in which they ran a candidate (allowing for a maximum of $3,229,400 for parties that contested all 72 electorates). Third party promoters who register with the Electoral Commission were entitled to incur up to $330,000 in election expenses. In theory, these caps on spending not only allow for a measure of some political equality between electoral participants, but also limit their need to raise funds. If you can only spend a certain amount on your own campaign, and can be sure your opponents will be similarly constrained in their spending, then the requirement to get money to compete is consequently reduced.

Such caps on election expenses, however, only apply to a relatively narrow range of electoral practices: in essence, advertising undertaken during the three-month 'regulated period' preceding polling day. Activities such as opinion polling, running focus groups, candidate travel, hiring campaign advisors, renting campaign offices and the like are not included. Nor does the cap on election expenses include advertising that is carried out before the three-month pre-election regulated period begins. In this era of the 'permanent campaign', such continuous political messaging is regarded as very important. Recall why then National Party leader Simon Bridges was so happy to hear from Jami-Lee Ross that a group of businessmen had made a $100,000 donation to his party:

> Um, look, I just think we want it for, uh, the advertisements and the like, you know? We want it for the things that we're gonna need to do over the next year or so, sort of outside of the – not outside of the party but um, uh, you know, like I say we want to do some more attack ads – say we want to do another regional fuel one, say we want to do another industrial relations one. We just want to keep doing those things, right? (Spinoff, 2018)

Consequently, the regulated election expenses incurred for each campaign represent but a fraction of the total that will actually be spent on seeking election. The full extent of such expenditure is shrouded in mystery as candidates, parties and promoters are required to publicly report only on their election expenses following each contest, not their full campaign accounts.

However, extending the existing controls on election expenditure carries potential risks. Such political spending is actually a democratic good, insofar as it enables candidates and parties to reach and attempt to persuade voters. Limit that spending too much, or for too long, and you may create a less well-informed electorate. This effect may be particularly keenly felt by smaller or newer political actors who find it more difficult to gain coverage from the 'free media'. Such

consequences may then create problems in relation to the right to freedom of expression, as guaranteed by the New Zealand Bill of Rights Act 1990, section 14. While the aim of creating a measure of political equality can justify some limits on election spending,[1] tightening those limits too much can become unjustifiable.[2] Equally, stricter controls on political spending by candidates or parties may have the effect of displacing such expenditure in ways that actually are less accountable. For example, rather than a party or candidate directly spending money on campaigning, they may coordinate with a third party individual or group to do so on their behalf.

Where does all this money come from?

Even with the just discussed, and somewhat rudimentary, cap on election expenses in place, obtaining enough money to fund campaigns to a level that is competitive with (or, even better, greater than) your opponents is considered to be very important. If you cannot self-fund – see Kim Dotcom, Colin Craig, Gareth Morgan – you have to go out to supporters and solicit donations from them. Which creates a potential problem for a representative democracy like New Zealand. Recall that elected representatives are expected to act in the interests of those they govern. This is the basic deal society makes when we vote in elections: we accept that those who win at the polls obtain authority to exercise power over us collectively, as long as they remain committed to using this governing authority in our best interests.

Of course, determining what are the interests of the governed and how power should be exercised in order to serve these interests is not exactly a straightforward matter. The entire basis for human politics is that different people will have different views as to how much different interests matter and how these can best be met. There is a good reason why we have an ACT party and a Green Party and a Māori Party (and a whole host of other parties) all advocating their different policies each election. But one thing that definitely has to be off the table in a properly functioning system of representative democracy is any idea that elected representatives will make decisions based largely on who is paying their bills. Engaging in these sorts of explicit transactions – 'in exchange for this personal gain, I'll use political power thus' – is considered to be a serious crime, as Philip Field discovered in 2009 upon being convicted of and jailed for bribery and corruption.

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While such direct quid pro quo deals thankfully remain extremely rare in New Zealand's political culture, reliance on private funding of our national politics still poses a problem. Because, as is unavoidable in a country with a market-capitalist economy, the money that candidates and parties seek to fund their activities is not evenly distributed. You only have to look over the list of disclosed donors to National, Labour, ACT or the Greens (as well as undisclosed donors to the New Zealand First Foundation) to witness that disparity. Only a very small segment of New Zealand's society could even contemplate making a $15,000 (let alone $150,000, or even greater) donation to the political party of their choice.

Yet recall that our governing compact – representatives have our consent to exercise power over us, provided they then use it in our interests – is premised on an assumption that we all should have an equal say in who gets to govern. We have long since rejected John Stuart Mill's proposal that some groups of people deserve to cast more votes because they will have better ideas about how to run our society (Mill, 1977, p.475). Why, then, do we allow for unlimited private funding of those who are competing for public power? Isn't that a form of potential political influence that is just as important, or maybe even more important, than actually casting a vote? Put it this way: if someone were to say to a candidate or party, 'I'll either give you $15,000, or my vote on election day', which option do you think would be chosen?

Of course, by law all significant donations have to be disclosed first to the Electoral Commission and then to the public, which is intended to disincentivise exchanging money for policy influence. The Electoral Act 1993 requires the reporting of the names and addresses of those making donations of over $1,500 to individual candidates, or $15,000 to political parties in a calendar year. The theory is that such reports will expose large gifts to the disinfecting sunlight of public scrutiny. Any policy decisions that favour donors can be queried and their justification held up for close inspection. In turn, the prospect of such questioning will dissuade donors and political actors from even trying to exchange financial support for public policy outcomes. However, events in the last parliamentary term suggest that this disclosure regime has serious flaws in both its design and its implementation.

First, the criminal charges brought by the Serious Fraud Office (SFO) against former National MP Jami-Lee Ross and three businessmen suggest a problem with the current threshold for public disclosure of donations. In short, these individuals are accused of disguising the true source of two donations of $100,000 to the National Party by dividing them among several 'straw' donors, each of whom then appeared to donate less than the $15,000 amount requiring disclosure. If proven, this stratagem is illegal and the attempt to use it a crime. However, New Zealand's

comparatively high disclosure threshold still makes it a viable way of disguising the true source of a large donation. While breaking a donation up and passing it on through several individuals is not entirely risk-free, it still is far less likely to be detected than having to do so among (say) 20 or more individuals.

Second, the details of donations made between 2017 and 2019 to the New Zealand First Foundation show that other, apparently legal, ways may be used to disguise the source of comparatively large donations. In particular, records of donations to the foundation show several related entities under one individual's control making a number of donations just under the disclosure threshold within a few days of each other (Espiner and Newton, 2020). The Electoral Act 1993, section 207LA(1) makes it a 'corrupt practice' to direct or procure '2 or more bodies corporate to split between the bodies corporate a party donation in order to conceal the total amount of the donation and avoid the donation's inclusion by the party secretary in the return of party donations'. However, none of the subsequent charges filed by the SFO against two individuals connected with the foundation were brought under this section. Rather, the charges relate to a general failure to transmit any of the party donations received by the foundation to the New Zealand First party's secretary, as required by law. Nor have any donors to the foundation been charged by the SFO. As such, it appears that the SFO has concluded that this pattern of donating cannot support criminal charges, despite its net effect being that the source of donations amounting to some tens of thousands of dollars would have remained hidden from the public even if the gifts to the foundation had properly been disclosed.

These two cases also point to inadequacies with the current means of enforcing the legal rules on disclosing political donations. Each alleged infraction came to the authorities' attention only because of quite unusual actions by individual whistle-blowers. In the case of the donation to the National Party, it was Jami-Lee Ross himself who reported the matter to the police in an effort to implicate his then party leader in the alleged offending. The source of information about donations to the New Zealand First Foundation is not certain, but it appears that some person or persons previously involved in the administration of New Zealand First passed documents over to members of the media. In both cases, audited annual party financial returns had been filed with the Electoral Commission that did not disclose any issues relating to the donations in question. The National Party apparently satisfied itself that the donations now before the court had come from the various individuals identified as giving the money, and so did not need to report the apparent donors' identity to the commission as their gifts were below the disclosure threshold. The New Zealand First party secretary apparently was not told about any donations to the foundation over a three-year period and so could not report them as required by the Electoral Act 1993.

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This state of affairs underscores the Electoral Commission's very limited role in receiving and publishing political party (and candidate) financial returns. It carries out no independent auditing function to check that they are correct. It has no power to compel information from a party or candidate in relation to a return. At most, it has a statutory obligation in situations where it 'believes that any person has committed an offence …, [to] report the facts on which that belief is based to the New Zealand Police'. In practice, rather than report suspected offending, the commission has in past cases of apparently erroneous financial returns instead preferred to seek the cooperation of parties and candidates to have a corrected version filed.

As a result, it may be that the existing law on donations and their disclosure became regarded as something of a paper tiger. If those involved in election campaigns, whether as candidates, party officials or donors, conclude that a failure to follow the rules around party funding is unlikely to be detected and not punished even if it is, then those rules come to lose their efficacy. Donations that raise no particular concerns may still be reported as is required by the law. However, donations that are considered politically embarrassing or worse may be hidden from the public through legal means or otherwise. If that indeed is the case, then the entire premise of the disclosure regime is defeated.

Of course, the SFO's actions in charging individuals in relation to the National Party donation and the New Zealand First Foundation's activities, as well as its ongoing investigation into donations to the Labour Party and the mayoral campaign in Auckland, may cause those involved in politics to reconsider the risk–reward calculus around disclosing donations. However, we should take this opportunity to consider whether the existing law requiring disclosure of political donations is fit for purpose, as well as whether the Electoral Commission's role in overseeing that law is sufficient.

Beyond private funding of election activities

Even a perfectly working disclosure system in which every donation above a particular threshold becomes publicly known does not really address the basic inequities involved in private political funding. There still will be a very small group in our society whose wealth alone gives them greater capacity to influence who will govern us all. And the parties and

candidates that they choose to support (or not support) may thereby get an advantage in the political contest (even recognising, as I said at the beginning of this article, that having access to money is no guarantee of electoral success).

What, though, is the alternative? Because we cannot hope to take all money out of politics, trying to starve such activities of resources is an invitation for even greater rule bending and outright illegal practices. Furthermore, we really should not try to do so. Having different parties and candidates (and other groups as well) advocating for their best views of society and its future is both a necessary and a desirable part of public political life. Prevent that from happening and you destroy the entire basis of democracy.

One response is to cap the amount that each individual or entity may give and replace that funding with grants of public money, as Canada has done in recent years. Such 'cleaner' forms of political funding are argued to reduce the potential for overtly corrupt relationships, limit the influence that private funding may have over public policy, and also create a more diverse and equitable electoral playing field (Marziani and Skaggs, 2011).

Certainly, there is room in New Zealand to rethink public support for political parties, and perhaps even individual candidates. In particular, the $4,145,750 'broadcasting allocation' distributed between parties prior to each election is a hopelessly outdated means of supporting their electoral campaigns. There is no longer any good reason to apply a different form of regulation to broadcast advertising, particularly in light of the Court of Appeal's radical reworking of the legislative framework in the case of *Electoral Commission v Watson & Jones* [2016] NZCA 512. That decision effectively removed all broadcasting-specific constraints on political advertising from everyone except individual candidates and political parties. Consequently, interest groups or wealthy individuals can use broadcast advertising for political purposes subject only to the spending limits in the Electoral Act, while political parties cannot use this form of communication at all apart from the money given to them through the broadcasting allocation. Furthermore, the allocation criteria that the Electoral Commission is required to follow when distributing these funds are incoherent. They require both that larger and more successful parties be given a greater share of the resource, while also that the commission consider 'the need to provide a fair opportunity for each party … to convey its policies to the public by the broadcasting of election programmes on television'.

As such, these funds should be repurposed as general support for parties' electoral activities, rather than being tied to paying only for advertising via the broadcast media or internet. The criteria for distributing them also should be revisited to prioritise support for a diverse and competitive electoral environment. This can be achieved by, for instance, following the German allocation criteria, where the amount of funds granted for the first four million votes received by parties, which is 0.85 euro per valid vote, is higher than the amount granted for votes received beyond that, which is 0.70 euro per valid vote. And whether the amount of money that the state provides to aid political parties' election campaigns should be augmented to compensate for increased controls on forms of private funding is a conversation that we as a country really need to have.

Conclusion: the root of all evil is deeply rooted

Coming up with a satisfactory solution for all the issues raised by the intersection of money and politics is not easy. As Dan Lowenstein notes in a seminal law review article on campaign finance reform, 'the root of all evil is deeply rooted' (Lowenstein, 1989). But they are matters that we really do have to think about, for at their base lies the fundamental question of whether we can have trust in the process that determines how we all will have to live together. Once that trust is lost, then we no longer have a basis for making such decisions. And without that, well, we really don't have anything to go on at all.

1 Electoral Commission v Watson and Jones [2016] NZCA 512 at [23].

2 Libman v Quebec (Attorney General) [1997] 3 S.C.R. 569.

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